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No. 03-923

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROY I. CABALLES, RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Pet. App. 1a-10a) is reported at 207 Ill. 2d 504, 802 N.E.2d 202 (2003). The judgment of the Appellate Court of Illinois, Third District, is reported at 321 Ill. App. 3d 1063, 797 N.E.2d 250 (2001) (Table), and the opinion of that court (Pet. App. 11a-19a) is unreported. The oral ruling of the Circuit Court of the Thirteenth Judicial Circuit, LaSalle County, Illinois (Pet. App. 20a-27a), is unreported.

JURISDICTION

The Supreme Court of Illinois entered judgment on November 20, 2003. The petition for a writ of certiorari was filed on December 18, 2003, and granted on April 5, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a bench trial, respondent was convicted of one count of cannabis trafficking. The Illinois Appellate Court

affirmed. The Illinois Supreme Court reversed, holding that the use of a drug-detection dog during the legitimate traffic stop of respondent's vehicle violated the Fourth Amendment because the police had no reasonable suspicion that the vehicle contained illegal drugs.

1. On November 12, 1998, Trooper Daniel Gillette stopped respondent for speeding. Gillette informed the police dispatcher by radio that he was making the stop. Trooper Craig Graham, of the Illinois State Police Drug Interdiction Team, heard the radio transmission and told the dispatcher that he was going to meet Gillette and conduct a canine sniff. Pet. App. 1a.

Trooper Gillette approached respondent's car, informed him that he was speeding, and asked for his driver's license, vehicle registration and proof of insurance. Respondent complied. Gillette then instructed respondent to reposition his car on the shoulder of the road so that it would be out of traffic, and to come to the squad car because it was raining. Respondent again complied. *Id.* 2a.

Once Trooper Gillette and respondent were seated in the squad car, Gillette told respondent that he was going to write a warning ticket for speeding. Gillette then called the police dispatcher to determine whether respondent's license was valid and to check for outstanding warrants. The dispatcher reported that respondent had surrendered his Illinois license to Nevada, and two minutes later confirmed that his Nevada license was valid. After receiving this confirmation, Gillette asked the dispatcher for respondent's criminal history. *Ibid.*

Trooper Gillette then asked respondent for consent to search his vehicle, and respondent refused. Gillette next asked respondent if he had ever been arrested, and respondent said no. Shortly thereafter, the dispatcher reported that respondent had two prior arrests for distribution of marijuana. *Ibid.*

While Trooper Gillette was writing the warning ticket, Trooper Graham arrived with a drug-detection dog and began walking around respondent's car. Less than one minute later, while Gillette was still writing the ticket, the dog alerted at the trunk. After being advised of the alert, Gillette searched the trunk and found marijuana. Respondent was arrested and charged with one count of cannabis trafficking. *Id.* 2a-3a, 13a.

2. Respondent moved to suppress the marijuana and to quash his arrest. The trial court denied the motion (Pet. App. 20a-27a) and, following a bench trial, found respondent guilty of cannabis trafficking. Respondent was sentenced to twelve years in prison and ordered to pay a street value fine of $256,136. The Illinois Appellate Court affirmed. *Id.* 11a-19a.

3. In a four-to-three decision, the Illinois Supreme Court reversed. Pet. App. 1a-10a. To determine the validity under the Fourth Amendment of the canine sniff, the majority applied the two-part test of *Terry v. Ohio*, 392 U.S. 1 (1968), "(1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Pet. App. 4a (citation and internal quotations omitted). The majority found that the traffic stop was justified at its inception, but concluded that the troopers "impermissibly broadened the scope of the traffic stop" by using the drug-detection dog to sniff respondent's car. *Ibid.*

In so concluding, the majority relied heavily upon *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275 (2002), cert. denied, 539 U.S. 937 (2003). The police in *Cox* pulled over the defendant's vehicle because it did not have a rear registration light. *Id.* at 464, 782 N.E.2d at 277. A drug-detection dog was brought to the scene and alerted to the presence of drugs. *Ibid.* The trial court suppressed the evidence, and the Illinois Appellate Court affirmed. *Id.* at 465, 782 N.E.2d at 277-278. Applying *Terry*

principles, the Illinois Supreme Court affirmed on two separate grounds. First, the court held that the police had improperly extended "the duration of the traffic stop" in order to allow the drug-detection dog to arrive from elsewhere. *Id.* at 469-470, 782 N.E.2d at 280. Second, putting aside duration, *Cox* held that because the sniff broadened the scope of traffic stop, it would have been permissible only if "specific and articulable facts" suggested that the defendant's vehicle contained drugs. *Id.* at 470-471, 782 N.E.2d at 280-281.

In this case, the majority did not find that the troopers had extended the duration of respondent's traffic stop. Rather, relying exclusively upon *Cox*'s second holding, the majority held that the troopers broadened the scope of the stop into a drug investigation, and that they had no "specific and articulable facts to support the use of a canine sniff." Pet. App. 4a-5a. Accordingly, the majority concluded that "the trial court should have granted [respondent]'s motion to suppress based on the unjustified expansion of the scope of the stop." *Id.* 5a.

Joined by Justices Fitzgerald and Garman, Justice Thomas dissented. The dissent criticized the majority for failing to acknowledge *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983), which establish that a canine sniff is not a search under the Fourth Amendment. Pet. App. 7a. Because a canine sniff is not a search, the dissent concluded that "the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it." *Id.* 10a.

Justice Thomas explained that the rule of law set down by the majority — that a canine sniff must be justified by a reasonable suspicion that the vehicle contains illegal drugs — has no conceivable basis in precedent. The dissent noted that if a canine sniff is a search, it must be supported by probable cause, but if a sniff is not a search, it requires no independent justification. *Ibid.* By holding that canine sniffs must be

justified by reasonable suspicion, the majority created an untenable "middle ground," improperly extending *Terry* to searches for incriminating evidence and erroneously equating canine sniffs with *Terry* investigative stops. *Ibid.* The dissent concluded that the majority's ruling "is wholly incompatible with United States Supreme Court case law construing the fourth amendment and is subject to reversal by that court." *Ibid.*

4. Illinois filed a timely petition for certiorari, which was granted. 124 S. Ct. 1875 (2004).

SUMMARY OF ARGUMENT

The Fourth Amendment does not require police to have reasonable suspicion that illegal drugs are present before using a drug-detection dog to sniff the exterior of a vehicle during a legitimate traffic stop. Because the sniff is not a Fourth Amendment search, it requires no independent justification when conducted on a vehicle that has already been detained following an observed traffic violation. That is, a traffic stop justified by probable cause does not lose its legitimacy when a canine sniff occurs during the stop.

In holding otherwise, the Illinois Supreme Court failed to acknowledge settled precedent establishing that canine sniffs are not Fourth Amendment searches. Instead, scrutinizing the sniff of respondent's car under the *Terry* doctrine, the majority invalidated the sniff upon concluding that the officers did not have reasonable suspicion that illegal drugs were present. The majority's analysis erred in two respects. First, the *Terry* doctrine does not govern traffic stops justified by probable cause or canine sniffs that occur during such stops. Second, even if the *Terry* doctrine applied, the sniff of respondent's car still was lawful under the Fourth Amendment because it did not entail any additional intrusion on respondent's legitimate privacy or possessory interests.

ARGUMENT

I. The Fourth Amendment Does Not Require Reasonable Suspicion To Use A Drug-Detection Dog To Sniff The Exterior Of A Vehicle During A Traffic Stop Justified By Probable Cause.

We begin with a matter that the majority below did not address: the status of canine sniffs under the Fourth Amendment. Settled precedent holds that a sniff by a drug-detection dog, in and of itself, is not a search. Given this premise, it does not violate the Fourth Amendment to conduct a canine sniff on the exterior of a vehicle during a traffic stop justified by probable cause.

In *United States v. Place*, 462 U.S. 696 (1983), an officer subjected the defendant's luggage to a canine sniff. *Id.* at 698-699. The dog alerted to the luggage, which later was found to contain cocaine. *Id.* at 699. In considering defendant's challenge to his conviction, this Court noted that if a canine sniff were a Fourth Amendment search, then the seizure of the luggage "could not be justified on less than probable cause." *Id.* at 706. The Court concluded, however, that a sniff by a drug-detection dog is not a search:

> The Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy. * * * A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a

> contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Id. at 707. After stating that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure," the Court held that a canine sniff in a public place "d[oes] not constitute a 'search' within the meaning of the Fourth Amendment." *Ibid.*

The Court has never questioned *Place*'s holding that canine sniffs are not searches. See *Soldal v. Cook County, Illinois*, 506 U.S. 56, 63 (1992) (noting that *Place* held "that subjecting luggage to a 'dog sniff' did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest"); *United States v. Jacobsen*, 466 U.S. 109, 123-124 (1984) (same); see also *Kyllo v. United States*, 533 U.S. 27, 47 (2001) (Stevens, J., dissenting) ("in [*Place*], we held that a dog sniff that discloses only the presence or absence of narcotics does not constitute a search within the meaning of the Fourth Amendment") (internal quotations and citations omitted); *Bond v. United States*, 529 U.S. 334, 341 (2000) (Breyer, J., dissenting) (noting "the accepted police practice of using dogs to sniff for drugs hidden inside luggage").

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court expressly reaffirmed *Place* with respect to canine sniffs of the exterior of a vehicle. *Edmond* considered a challenge to a drug-interdiction checkpoint where vehicles were subjected to a sniff by a drug-detection dog. The Court concluded that the checkpoint violated the Fourth Amendment because it was suspicionless and undertaken for an improper primary purpose.

Id. at 41-44; see also *Illinois v. Lidster*, 540 U.S. ___, 124 S. Ct. 885, 888 (2004) ("*Edmond* involved a checkpoint at which the police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles.")

In so ruling, however, *Edmond* reaffirmed *Place*'s holding that use of a drug-detection dog to sniff the exterior of a vehicle is not a Fourth Amendment search:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. *The fact that an officer walks a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search.* See *United States v. Place*, 462 U.S. 696, 707 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is much less intrusive than a typical search. Rather, what principally [makes] these checkpoints [unlawful] is their primary purpose.

531 U.S. at 40 (emphasis added) (internal quotations and most citations omitted). Thus, the Fourth Amendment infirmity in *Edmond* was not that a dog sniff transformed a vehicular seizure into a search — the Court made clear that a sniff is not a search — but that the vehicles had been improperly seized in the first place. *Id.* at 40-44.

Because a sniff by a drug-detection dog is not a search, the Illinois Supreme Court erred in holding that reasonable suspicion is required to conduct a sniff of a vehicle already detained on probable cause that a traffic violation occurred. The reason is rooted in long-settled Fourth Amendment doctrine: When police officers, positioned at a lawful vantage point, discover

incriminating facts without conducting an additional search or seizure, the discovery causes no intrusion on privacy or security and therefore does not violate the Fourth Amendment. See *Minnesota v. Dickerson*, 508 U.S. 366, 374-375 (1993); *Horton v. California*, 496 U.S. 128, 133 n.5, 141 (1990); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *United States v. Hensley*, 469 U.S. 221, 235 (1985); *Michigan v. Long*, 463 U.S. 1032, 1050 (1983); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

Thus, if Trooper Gillette, when requesting respondent's license and registration, had seen a bag of cocaine or a handgun on the passenger seat, that visual observation would not have been a search and therefore would not have violated the Fourth Amendment. See *Whren v. United States*, 517 U.S. 806, 808-809 (1996) (officer who pulled over vehicle for traffic violations observed bag of crack cocaine in driver's hands); *Hensley*, 469 U.S. at 224 (during investigatory stop of vehicle, officer observed butt of revolver protruding from underneath passenger's seat); *Long*, 463 U.S. at 1036 (during investigatory stop of vehicle, officer discovered bag of marijuana under arm rest). Likewise, if Trooper Graham, upon his arrival at the traffic stop, had smelled marijuana smoke coming from the passenger compartment or the scent of a corpse coming from the trunk, that olfactory observation would not have violated the Fourth Amendment. See 1 Wayne R. LaFave, *Search and Seizure*, § 2.2(a), at 403 (3d ed. 1996).

The same result obtains under the actual facts of this case. Because there was probable cause to stop respondent for speeding, Troopers Gillette and Graham were entitled to detain and approach respondent's car. The marijuana odors that caused the drug-detection dog to alert were present in the air surrounding the car. Respondent had no legitimate expectation of privacy in the air surrounding his car. See *New York v. Class*, 475 U.S. 106, 114 (1986) ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does

not constitute a 'search.'"). He certainly had no legitimate expectation of privacy in the marijuana odors outside of his car. See *Jacobsen*, 466 U.S. at 123 ("[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy"); *Place*, 462 U.S. at 707. Thus, the canine sniff of respondent's car entailed no intrusion — more specifically, no intrusion beyond that already effected by its lawful seizure — on respondent's legitimate privacy and possessory interests. See *Dickerson*, 508 U.S. at 375-376. For that reason, the sniff did not violate the Fourth Amendment.

Two considerations might be advanced to support a contrary result, but neither has merit. The first consideration is that Trooper Graham used a dog, rather than his own faculties, to detect the odor of marijuana outside respondent's car. This consideration could not be squared with *Edmond* and *Place*, which held, respectively, that "an exterior sniff of an automobile * * * is not designed to disclose any information other than the presence or absence of narcotics," 531 U.S. at 40, and that a canine sniff "disclos[ing] only the presence or absence of narcotics, a contraband item," invades no legitimate privacy interest, 462 U.S. at 707. See also Jacobsen, 466 U.S. at 123-124. Thus, it is of no Fourth Amendment moment that Trroper Graham used a *dog's* superior sense of smell, rather than his own, to detect the odor of marijuana outside of respondent's vehicle. Compare *Kyllo*, 533 U.S. at 38 (use of thermal imaging device "might disclose" intimate details of the home, such as "at what hour each night the lady of the house takes her daily sauna and bath").

It might also be argued that the sniff was unlawful because the dog's arrival at respondent's traffic stop was not inadvertent. See Pet. App. 4a ("In *Cox*, we concluded that evidence obtained by a canine sniff was properly suppressed because calling in a canine unit unjustifiably broadened the scope of an

otherwise routine traffic stop into a drug investigation.") (citing *Cox*, 202 Ill. 2d at 469, 471, 782 N.E.2d at 280-281). Such a consideration could not be squared with *Horton v. California*, *supra*. In *Horton*, a police officer searched the defendant's home pursuant to a warrant; the warrant authorized a search for rings stolen during an armed robbery, but not for the weapons used in the robbery. 496 U.S. at 130-131. While conducting the search, the officer discovered the weapons in plain view. *Id.* at 131. The defendant argued that the weapons should have been suppressed because the officer wanted to discover them. This Court disagreed, holding that the Fourth Amendment imposes no "inadvertence" requirement where the police discover incriminating evidence from a lawful vantage point without effecting any additional intrusion on the defendant's legitimate privacy interests. *Id.* at 141-142. Under *Horton*, it does not matter under the Fourth Amendment that Trooper Graham and his dog did not inadvertently stumble upon the scene of respondent's traffic stop.

For these reasons, conducting a canine sniff during the course of respondent's traffic stop did not violate the Fourth Amendment. The Illinois Supreme Court's contrary ruling should be reversed.

II. The Illinois Supreme Court Erred In Invoking *Terry* To Invalidate Canine Sniffs At Traffic Stops Justified By Probable Cause.

The foregoing provides all the grounds necessary to reverse the judgment below. We nonetheless proceed to address the Illinois Supreme Court's erroneous invocation of the *Terry* doctrine, which led it to hold that the Fourth Amendment requires reasonable suspicion that drugs are present to justify a canine sniff of the exterior of a vehicle during a traffic stop supported by probable cause.

In ruling that reasonable suspicion is required in this context, the majority below did not address the settled principle that a canine sniff is not a Fourth Amendment search. Pet. App. 7a (Thomas, J., dissenting) (criticizing majority for ignoring *Place* and *Edmond*); see also *Cox*, 202 Ill. 2d at 480-485, 782 N.E.2d at 285-288 (Thomas, J., dissenting) (same). Instead, the majority analyzed respondent's traffic stop as if it were a *Terry* stop, holding that reasonable suspicion was required to conduct the dog sniff because the sniff "broadened the scope of the traffic stop in this case into a drug investigation." Pet. App. 4a; see also *Cox*, 202 Ill. 2d at 466-471, 782 N.E.2d at 278-281 (same).* Finding the facts insufficient to establish reasonable suspicion that respondent was transporting illegal drugs, the majority held that the sniff violated the Fourth Amendment. Pet. App. 4a-5a; see also *Cox*, 202 Ill. 2d at 470-471, 782 N.E.2d at 280-281 (same).

The Illinois Supreme Court's application of *Terry* is erroneous in two separate respects. First, *Terry* does not govern a canine sniff of the exterior of a vehicle at a traffic stop supported by probable cause. Second, even if *Terry* applied, canine sniffs under those circumstances still would comport with the Fourth Amendment.

A. To support its application of *Terry* to traffic stops justified by probable cause, the Illinois Supreme Court relied upon its prior decision in *People v. Gonzalez*, 184 Ill. 2d 402, 420-422, 704 N.E.2d 375, 384 (1998), cert. denied, 528 U.S. 825 (1999). Pet. App. 3a-4a. *Gonzalez*, in turn, cited *Berkemer*

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* Likewise, in *People v. Harris*, 207 Ill. 2d 515, 802 N.E.2d 219 (2003), pet. for cert. pending, No. 03-1224, the Illinois Supreme Court invoked *Terry* in holding that reasonable suspicion is generally necessary to justify conducting a warrant check of a passenger during a traffic stop supported by probable cause. *Id.* at 521-531, 802 N.E.2d at 224-230.

v. McCarty, 468 U.S. 420, 439 (1984), *Michigan v. Long*, 463 U.S. 1032, 1047-1052 (1983), and *Pennsylvania v. Mimms*, 434 U.S. 106, 111-112 (1977), for the proposition that this Court "has extended the *Terry* principles to situations involving traffic stops in order to minimize the dangers faced by law enforcement officers during these encounters." 184 Ill. 2d at 422, 704 N.E.2d at 384. In a later case, the Illinois Supreme Court cited *United States v. Sharpe*, 470 U.S. 675, 682 (1985), for the same proposition. See *People v. Gonzalez*, 204 Ill. 2d 220, 226, 789 N.E.2d 260, 265 (2003) ("as a general rule, a fourth amendment challenge to the reasonableness of a traffic stop is analyzed under *Terry* principles") (citing *Sharpe*).

None of the four precedents cited by the Illinois Supreme Court supports the view that *Terry* governs police actions at traffic stops justified by probable cause. Both *Sharpe* and *Long* involved *Terry* stops of vehicles. See *Sharpe*, 470 U.S. at 677 (DEA agent made an "investigatory stop" of vehicle); *Long*, 463 U.S. at 1035 n.1 ("The court below treated this case as involving a protective search, and not a search justified by probable cause to arrest for speeding, driving while intoxicated, or any other offense."). Those two cases, which stand for the unremarkable proposition that *Terry* stops should be evaluated under *Terry*, cannot be read to hold that *Terry* governs traffic stops justified by probable cause.

Unlike *Sharpe* and *Long*, *Berkemer* considered a traffic stop supported by probable cause. The question in *Berkemer* was whether roadside questioning of a motorist detained at a traffic stop constitutes "custodial interrogation" for purposes of the *Miranda* doctrine. 468 U.S. at 423. In the course of holding that such motorists are not "in custody" for *Miranda* purposes, *Berkemer* stated that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest." *Id.* at 439 (citation omitted).

The Illinois Supreme Court seized on this passage in concluding that *Terry* governs police action at all traffic stops, even those justified by probable cause. See *Gonzalez*, 184 Ill. 2d at 421-422, 704 N.E.2d at 384. In so doing, however, the court ignored the footnote immediately following that passage:

> No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.

Berkemer, 468 U.S. at 439 n.29. Given this caveat, *Berkemer* does not support extending *Terry* to traffic stops justified by probable cause. If anything, *Berkemer* precludes such an extension. See *United States v. Childs*, 277 F.3d 947, 953 (7th Cir.) (en banc) ("although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation" for stops justified by probable cause) (citing *Berkemer*, 468 U.S. at 439 n.29), cert. denied, 537 U.S. 829 (2002).

Pennsylvania v. Mimms, the fourth precedent cited by the Illinois Supreme Court to support its view that *Terry* governs traffic stops justified by probable cause, is equally unavailing. After stopping the defendant for driving with an expired license plate, the officer asked the defendant to step out of his car. *Mimms*, 434 U.S. at 107. As the defendant exited the car, the officer noticed a large bulge under his sport jacket, frisked him, and discovered in his waistband a revolver loaded with ammunition. *Ibid.* The Pennsylvania Supreme Court held that the officer's order to the defendant to step out of his car was an impermissible seizure. *Id.* at 107-108. This Court reversed, holding that the Fourth Amendment allowed the officer to require the defendant to exit his vehicle and to frisk him upon observing the bulge under his jacket. *Id.* at 108-112.

The Illinois Supreme Court was wrong to read *Mimms* as establishing that *Terry* governs traffic stops supported by probable cause. *Mimms* cited *Terry* for the commonsense proposition that police officers may take reasonable steps to protect their safety during a traffic stop. *Id.* at 109-112. The citation of *Terry* for that purpose did not equate probable cause-based traffic stops with *Terry* stops, and did not suggest that traffic stops justified by probable cause would be subject to the limitations imposed by *Terry* upon investigatory stops justified only by reasonable suspicion. Any doubt on this score is resolved by *Berkemer*, which, seven years after *Mimms*, cautioned that the factual similarity between ordinary traffic stops and *Terry* stops "of course do[es] not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer*, 468 U.S. at 439 n.29. *Berkemer* conclusively defeats the notion that *Mimms* extended *Terry* to traffic stops justified by probable cause.

Other facets of this Court's Fourth Amendment jurisprudence confirm that traffic stops supported by probable cause are not governed by *Terry*. The *Terry* doctrine requires that investigatory stops have a limited duration and not "resemble a traditional arrest." *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. ___, slip op. at 7 (2004); see also *Sharpe*, 470 U.S. at 683-688 (citing cases). By contrast, if there is probable cause to believe that a driver has committed a minor traffic offense, a police officer "may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); see also *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). In this most fundamental sense, a stop supported by probable cause is not a *Terry* stop. It would erode the important distinction between the two types of seizures to apply *Terry* principles, which impose stringent limits on the scope and duration of a seizure, to traffic stops justified by probable cause.

Another difference lies in the distinct modes of analysis applied to *Terry* stops, on the one hand, and traffic stops justified by probable cause, on the other. The validity of *Terry* stops, and of police conduct occurring at such stops, depends upon a fact-specific balancing of "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Hensley*, 469 U.S. at 228; see also *Hiibel*, slip op. at 9-10. Such fact-specific balancing is inappropriate when determining the validity of routine traffic stops supported by probable cause and of police conduct occurring at such stops. See *Atwater*, 532 U.S. at 354-355; *Whren*, 517 U.S. at 817-819; see also *Hensley*, 469 U.S. at 236-237 (Brennan, J., concurring). In this sense as well, the *Terry* doctrine is fundamentally incompatible with traffic stops justified by probable cause.

The incompatibility is particularly acute with respect to canine sniffs conducted during probable cause-based traffic stops. *Terry* permits police officers to briefly detain individuals to question them about suspected criminal activity and to pat them down for weapons. See *Dickerson*, 508 U.S. at 373. Due to the intrusive nature of a *Terry* stop — where the officer seeks information directly from, and can lay hands directly upon, the seized individual — the Fourth Amendment requires that such stops be justified by reasonable suspicion that criminal activity is afoot. See *Terry*, 392 U.S. at 20-22. During a canine sniff, by contrast, the car and its occupants are not touched by the dog or its handler, and the sought-after information is obtained without questioning anybody. Indeed, in finding that dog sniffs are not searches, the Court observed that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Place*, 462 U.S. at 707. Thus, while the Fourth Amendment appropriately demands reasonable suspicion to justify the moderate intrusions that take place during *Terry* stops, there is no basis to similarly

restrain canine sniffs conducted on the exterior of vehicles that are already the subject of a lawful seizure.

For these reasons, the Illinois Supreme Court erred in using *Terry* principles to evaluate the canine sniff at respondent's traffic stop. This analytical error prompted the majority's incorrect conclusion that the sniff violated the Fourth Amendment. Evaluating the sniff under the appropriate doctrines (see Section I, *supra*) results in the conclusion that there was no Fourth Amendment violation.

B. Even if the *Terry* doctrine governed this context, the canine sniff of respondent's vehicle still would pass Fourth Amendment muster. This is so largely for the reasons set forth at pages 9-11, *supra*.

As noted above, when police officers from a lawful vantage point discover incriminating facts without conducting an additional search or seizure, the discovery does not violate the Fourth Amendment. This principle applies with equal force when an officer's vantage point is justified by *Terry*. See *Dickerson*, 508 U.S. at 374-375; *Hensley*, 469 U.S. at 235; *Long*, 463 U.S. at 1050.

In *Dickerson*, for example, this Court considered whether police officers may seize nonthreatening contraband detected by touch during a *Terry* weapons frisk. 508 U.S. at 373. The Court concluded that the Fourth Amendment permits such seizures, holding that the plain-view doctrine "has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search." *Id.* at 375. The Court explained: "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Ibid.* The Court made clear that an object's "iden-

tify" or "incriminating character" is "immediately apparent" so long as it can be ascertained "without conducting some further search of the object." *Ibid.*

Here, Troopers Graham and Gillette had legitimate grounds to stop and approach respondent's car. The marijuana odors in the air surrounding the car were discovered without effecting any additional search, seizure or other intrusion on respondent's vehicle or his privacy or possessory interests. Thus, even if it were appropriate to scrutinize the canine sniff under the *Terry* doctrine, the sniff still did not violate the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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